No. 91-255

In The

Supreme Court of the United States

October Term, 1991

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON,

Petitioners,

vs.

HOLIDAY INNS OF AMERICA, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The State of Missouri does not deny equal access to Missouri Courts for citizens of Illinois, either by statute or by judicial precedent and no court violated petitioners' rights under the equal protection clause or due process clause of Amendment Fourteen, Section 1 of the United States Constitution.

Petitioners John and Cynthia Bourguignon did not raise their equal protection clause argument in the Court of Appeals or in any lower court. As this constitutional argument is being raised for the first time in their Petition for Writ of Certiorari, this Court should refrain from addressing it.

A review of the United States District Court's opinion reveals that petitioners John and Cynthia Bourguignon have presented a misleading and inaccurate account of the facts regarding their litigation against Holiday Inns of America, Inc. in the federal courts and state courts of Missouri. Contrary to petitioners' arguments, the facts of the *Bourguignon* litigation in the federal courts and Missouri state courts are significantly different from the facts in *Arana v. Koerner,* 735 S.W.2d 729 (Mo.App. 1987).

The Missouri state courts did nothing more than rule on the *Bourguignon* cases and the *Arana* case according to their specific facts and according to the legal principles which applied to each specific case. There is not one shred of evidence of discrimination in favor of Missouri citizens and against Illinois citizens in the Missouri state courts.

LIST OF PARTIES

Respondent Holiday Inns of America, Inc. has no subsidiary corporations. Holiday Inns of America, Inc. is a subsidiary of Holiday Inns, Inc., which is in turn a subsidiary of Holiday Corporation. In addition, Holiday Corporation is a subsidiary of Bass (U.S.A.), Inc.

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OPINIONS BELOW

The pertinent opinions below are included in the Petitioners' Appendix and in Respondent's Appendix. The opinion of the District Court filed on June 8, 1990, and the opinion of the Court of Appeals filed on March 19, 1991 are not reported officially or unofficially and are appended to Petitioners' Appendix, pages 1-17.

A copy of the Court of Appeals' Order denying rehearing, dated May 14, 1991, is included in Petitioners' Appendix, page 18.

The Missouri Court of Appeals has issued two decisions which directly relate to the Petition, which are reported as *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App. 1986) and *John Bourguignon and Cynthia Bourguignon v. Thirteen-Fifty Investment Co.*, 759 S.W.2d 300 (Mo.App. 1988). These decisions are included in Respondent's Appendix, pages 1-27.

JURISDICTION

Respondent Holiday Inns of America, Inc. asserts that the petitioners have failed to allege a constitutional violation invoking the jurisdiction of this Court since the decisions of the Missouri state courts and federal courts do not violate the equal protection clause and due process clause of Amendment Fourteen, Section 1 or any other section of the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

The Bourguignons have submitted an inaccurate, incomplete account of the facts in a misguided attempt to argue that the facts of this litigation are similar to the facts in *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987). Holiday Inns incorporates the statement of the facts set forth in the opinion of the United States District Court (Petitioners' Appendix, pages 3-17) and in the two opinions of the Missouri Court of Appeals relating to the same incident (Respondent's Appendix, pages 1-27). A review of these three court decisions reveals the serious

inaccuracies and omissions set forth in the Bourguignons' Statement of the Case.

Holiday Inns will summarize pertinent facts which are not presented in the Bourguignons' Statement of the Case.

The Bourguignons have filed three actions involving the same event, parties and issues, all arising out of John Bourguignon's accident on June 27, 1977 at a swimming pool in Warrensburg, Missouri. (Petitioners' Appendix, pages 3-17; Respondent's Appendix, pages 1-27). The Missouri Court of Appeals decided the first action, which will be referred to as *Bourguignon I*, in *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App. 1986). (Respondent's Appendix, pages 1-15). The Missouri Court of Appeals decided the second action, which will be referred to as *Bourguignon II*, in *John Bourguignon and Cynthia Bourguignon v. Thirteen-Fifty Investment Co.*, 759 S.W.2d 300 (Mo.App. 1988) (Respondent's Appendix, pages 16-27). The United States District Court for the Western District of Missouri issued its Order in the third action, which will be referred to as *Bourguignon III*. (Petitioners' Appendix, pages 3-17).

B. *Bourguignon I*

On June 24, 1982, three days before the expiration of the statute of limitations, R.S.Mo. § 516.120(1), John and Cynthia Bourguignon commenced *Bourguignon I* by filing a Petition in the Circuit Court of Lafayette County, Missouri against Thirteen-Fifty Investment Co. only, alleging

negligence in the operation and maintenance of the swimming pool. (Respondent's Appendix, pages 2, 17). The Bourguignons did not sue Holiday Inns, Inc. in this first action. (Respondent's Appendix, page 17).

The Missouri Court of Appeals stated that the Bourguignons failed to file suit against Holiday Inns in *Bourguignon I* before the expiration of the statute of limitations, in Footnote 3 at 714 S.W.2d 603 (Respondent's Appendix, page 15). Thirteen-Fifty filed a Third Party Petition against Holiday Inns in *Bourguignon I* on July 12, 1983, seeking noncontractual indemnity and/or apportionment of fault under several theories. (Petitioners' Appendix, page 4).

The Circuit Court in *Bourguignon I* granted the Bourguignons leave to file a First Amended Petition against Thirteen-Fifty on July 31, 1984, over the objections of Holiday Inns. (Respondent's Appendix, page 17). Paragraph 6 of the First Amended Petition in *Bourguignon I* adds allegations of negligence against Thirteen-Fifty for the construction activities of Holiday Inns. (Petitioners' Appendix, page 4).

On August 10, 1984, ten days after the Bourguignons filed their First Amended Petition in *Bourguignon I*, the Bourguignons, Thirteen-Fifty and Thirteen-Fifty's insurer, Employers Mutual Casualty Company, executed a settlement agreement. (Petitioners' Appendix, page 5). The Missouri Court of Appeals in *Bourguignon I* disapproved of this agreement, calling it a "contrivance" (Respondent's Appendix, page 10), and stating at 714 S.W.2d 603:

> In sum, the settlement agreement as structured is not consistent with the purpose of § 537.065.

> It motivates an indemnitee to compromise the rights of the indemnitor and to align its interest with those of the claimant in a manner which causes the indemnitee to avoid its responsibilities. And here, the failure by Thirteen-Fifty as an indemnitee to carry out those responsibilities toward its indemnitor, Holiday Inns, Inc., rose to the level requiring Holiday Inns to be discharged under the indemnity contract. (Respondent's Appendix, page 18)

Under this agreement, the Bourguignons were paid $990,000 by Employers Mutual in exchange for their agreement to limit execution against Thirteen-Fifty and Employers Mutual. (Petitioners' Appendix, page 5). In the agreement, Thirteen-Fifty admitted liability for the construction activities of Holiday Inns only. (Respondent's Appendix, pages 11-12, 19). The agreement also provided that if a judgment for contractual indemnity was obtained by Thirteen-Fifty against Holiday Inns, then all sums for indemnity greater than the amount of the judgment of plaintiffs against Thirteen-Fifty less the amount paid under the agreement would be passed through by Thirteen-Fifty to the Bourguignons. (Petitioners' Appendix, page 5; Respondent's Appendix, page 18).

Seven days after entering into this agreement, Thirteen-Fifty amended its Third Party Petition to incorporate the Bourguignons' First Amended Petition, including the allegations of negligence in construction by Holiday Inns. (Respondent's Appendix, page 18).

At the trial of *Bourguignon I*, held in October, 1984, the Bourguignons attempted to prove damages against

Thirteen-Fifty for the construction activities of Holiday Inns, as liability had been conceded by Thirteen-Fifty for the construction activities of Holiday Inns in the agreement. (Respondent's Appendix, page 18-19). As the Missouri Court of Appeals noted in *Bourguignon I*, Thirteen-Fifty's counsel admitted on the record at the trial of the first action, although out of the presence of the jury, that its interests in the case were aligned with the Bourguignons rather than Holiday Inns. (Respondent's Appendix, page 12). The jury was not allowed to hear any evidence concerning the agreement entered into between the Bourguignons and Thirteen-Fifty, over the objections of Holiday Inns. (Respondent's Appendix, pages 7, 19).

The jury returned a verdict against Thirteen-Fifty in favor of John Bourguignon for $12,500,000 and Cynthia Bourguignon for $2,000,000. (Petitioners' Appendix, page 5). Both verdicts were reduced by ten percent for John Bourguignon's comparative fault. (Petitioners' Appendix, page 5). the jury also returned a verdict in favor of Thirteen-Fifty on its contractual indemnification claim against Holiday Inns in the amount of $13,050,000. (Petitioners' Appendix, page 5).

Holiday Inns appealed the judgment entered against it on Thirteen-Fifty's third party claim in *Bourguignon I* and the Missouri Court of Appeals reversed without any remand for a new trial. *Bourguignon I*, 714 S.W.2d 597. (Petitioners' Appendix, page 5).

C. *Bourguignon II*

While *Bourguignon I* was on appeal, the Bourguignons filed a new case against Thirteen-Fifty and Holiday

Inns, in the Circuit Court of Johnson County, Missouri, which will be referred to as *Bourguignon II*. (Petitioners' Appendix, page 7). In their Second Amended Petition the Bourguignons sought to enforce an equitable creditor's bill granting them an interest in Thirteen-Fifty's indemnity claim against Holiday Inns. (Petitioners' Appendix, page 7). As the Missouri Court of Appeals stated in *Bourguignon II*, neither Thirteen-Fifty nor the Bourguignons had a judgment against Holiday Inns. 759 S.W.2d 302 (Respondent's Appendix, page 20).

The Bourguignons further alleged that Holiday Inns had intentionally and fraudulently concealed the defective construction of the swimming pool. (Petitioners' Appendix, page 7). Thirteen-Fifty filed a Cross-Claim and a First Amended Cross-Claim against Holiday Inns for non-contractual indemnification. (Petitioners' Appendix, page 7).

The Circuit Court granted Holiday Inns' Motion to dismiss the Bourguignons' Second Amended Petition and Thirteen-Fifty's First Amended Cross-Claim. (Petitioners' Appendix, page 7).

The Bourguignons and Thirteen-Fifty appealed, and the Missouri Court of Appeals affirmed the Circuit Court's order of dismissal on the basis of res judicata and collateral estoppel, in *Bourguignon II*, 759 S.W.2d 300. (Petitioners' Appendix, pages 9-12).

D. *Bourguignon III*

Following the Missouri Court of Appeals' decision affirming the dismissal of *Bourguignon II*, the Bourguignons filed a Complaint in the United States District

Court for the Western District of Missouri against Holiday Inns relating to the same incident. (Petitioners' Appendix, pages 19-26). This action will be referred to as *Bourguignon III*.

The Bourguignons' identical allegations of fraud against Holiday Inns in *Bourguignon II* and *Bourguignon III* were based on facts known to the Bourguignons during discovery in *Bourguignon I*. (Petitioners' Appendix, page 12).

Holiday Inns responded to the Bourguignons' Complaint in *Bourguignon III* by filing a Motion to Dismiss and for Sanctions pursuant to Rule 11, with Suggestions in Support. (Petitioners' Appendix, page 3).

The United States District Court entered its Order granting Holiday Inns' Motion to Dismiss *Bourguignon III* and denying Holiday Inns' Motion for Sanctions. (Petitioners' Appendix, pages 16, 17).

E. Bourguignons' Appeal to the Court of Appeals For the Eighth Circuit

The Bourguignons appealed from the United States District Court's dismissal of *Bourguignon III* and the Eighth Circuit Court of Appeals affirmed the District Court's decision in a one paragraph per curiam order. The Court stated "[h]aving thoroughly reviewed the record, we agree with the district court's careful analysis and accordingly affirm its decision." (Petitioners' Appendix, pages 1-2).

F. *Arana* Litigation Distinguished

The Bourguignons' citation to *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987) omits the fact that the two separate actions by Dr. Arana were filed on the same date, November 15, 1983. (Petitioners' Appendix, page 28; Respondent's Appendix, page 28). Both actions were filed within the period of the applicable statute of limitations, unlike the Bourguignons' failure to file against Holiday Inns prior to the expiration of the statute of limitations. (Respondent's Appendix, page 15).

G. Misstatements of Fact in Petitioners' Statement of the Case

In addition to the omissions in petitioners' Statement of the Case, certain inaccurate statements require a response from Holiday Inns.

On page 3, petitioners state that the pool was equipped with "false depth markers and was licensed for diving by the State of Missouri as a result of fraudulent plans and depth representations made by pool builder Holiday Inns to the State of Missouri, misrepresentations made unbeknownst to the motel owner." While there was testimony regarding the depth of the pool and inaccuracies in the plans and other documents at the trial of *Bourguignon I*, these matters were never specifically ruled upon by any trier of fact. Further, the Missouri Court reversed the judgment against Holiday Inns without remand in *Bourguignon I*. (Respondent's Appendix, pages 1, 15).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision by the Eighth Circuit Court of Appeals, affirming the opinion of the United States District Court, does not conflict with any provisions of the United States Constitution or any federal statutes and the Bourguignons did not suffer any violation of any constitutional rights.

The Bourguignons did not raise their present equal protection clause arguments in the Eighth Circuit Court of Appeals, in the United States District Court, in the Missouri state courts, or at any stage prior to their Petition for Writ of Certiorari.

Missouri does not discriminate against citizens of other states in its courts, either by statute or in any other fashion. The Bourguignons argue that merely because the courts in their case ruled against them, while the court in the *Arana* case ruled for the plaintiff, and because they are Illinois citizens while the plaintiff in the *Arana* case was a Missouri citizen, that Missouri courts discriminate against Illinois citizens. The Bourguignons ignore the reported factual and legal reasons for the three decisions against them in the Missouri state courts and the United States District Court and ignore the significant distinctions between the facts in their case and the facts in the *Arana* litigation. The Bourguignons ignore the Missouri Court's finding that they failed to sue Holiday Inns prior to the expiration of the statute of limitations and entered into a prejudicial combination with defendant Thirteen-Fifty Investment Co., which was condemned by the Missouri Court. The *Arana* litigation is free of such omission

and prejudicial conduct by plaintiff Dr. Arana. The Bourguignons' constitutional arguments are patently frivolous.

ARGUMENT

The Bourguignons failed to raise their present equal protection clause arguments in the Eighth Circuit Court of Appeals, in the United States District Court, in the Missouri courts, or in any legal proceeding in the lower courts. This Court should refrain from addressing the equal protection issue for that reason. *Equal Opportunity Employment Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986); *Rogers v. Lodge*, 458 U.S. 613, 628, n. 10, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). No extraordinary circumstances exist in this case which should lead this Court to depart from the normal practice of not addressing issues which were not raised in the Court of Appeals.

The Bourguignons complain that they have been "denied access" to the Missouri courts. As set forth in the opinion of the United States District Court and the two opinions of the Missouri Court of Appeals (Petitioners' Appendix, pages 3-17; Respondent's Appendix, pages 1-27), the Bourguignons had abundant access to the Missouri court system and the federal court system. They lost in all three actions which they brought arising out of the same accident. The last two defeats came when motions for summary judgment were granted in favor of Holiday

Inns and against the Bourguignons on the basis of res judicata and collateral estoppel. Both this Court and the Missouri courts have held that no constitutional rights are violated when a party does not go to trial because he has lost on the granting of a motion for summary judgment. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 336, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Finn v. Newsam*, 709 S.W.2d 889, 892-893 (Mo.App. 1986).

Missouri courts do not deny equal access to citizens of Illinois or citizens of any other state. The Bourguignons argue merely that because they have lost their case, and because Dr. Arana won his case in *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987), and because Dr. Arana was a Missouri citizen and the Bourguignons were Illinois citizens, that Missouri discriminated against them on the basis of state citizenship. This argument is patently frivolous. The Bourguignons have ignored the reported basis for the holdings of each of the decisions by the Missouri Court of Appeals, the United States District Court and the Eighth Circuit Court of Appeals. In *Bourguignon I*, the Missouri Court of Appeals held that the Bourguignons' prejudicial combination with defendant Thirteen-Fifty violated principles of Missouri law and was nothing more than an attempt by the Bourguignons to rectify their failure to sue Holiday Inns prior to the expiration of the statute of limitations. The Missouri Court of Appeals reversed the judgment against Holiday Inns for that reason. In the Missouri state court action characterized as *Bourguignon II*, and in the identical United States District Court action, the courts dismissed the Bourguignons' case on the basis of res judicata and collateral estoppel.

All of this is a far cry from the situation in Dr. Arana's litigation, in which he sued two different entities on the same day, November 15, 1983, both well within the statute of limitations. (Petitioners' Appendix, page 28, Respondent's Appendix, page 28). There is no hint in the Court's decision in *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987) that Dr. Arana filed the two actions in different courts out of a desire to rectify his failure to meet the statute of limitations. There is no hint in *Arana v. Koerner* that Dr. Arana participated in any prejudicial conduct which would have to be struck down by the Missouri courts, as in the Bourguignons' case. The facts of the *Arana* litigation and the Bourguignons' many lawsuits are completely different and no conclusions can be drawn from the fact that Dr. Arana won and the Bourguignons lost. Certainly no conclusion can be drawn that the Missouri Court decided Dr. Arana's case favorably to him because he is a Missouri citizen, while ruling against the Bourguignons because they were Illinois citizens. There is not one shred of evidence to support this alleged discrimination. The Bourguignons' suggestion that the Missouri Courts discriminated in this fashion is absolutely ridiculous.

The Bourguignons point out no inconsistencies between the Court of Appeals' decision and any federal decisions. The Bourguignons cite *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921) for the principle that this Court may go behind the finding of a state court decision to see whether it was without substantial support. A review of the two Missouri Court of Appeals' decisions and the United States District Court decision

(Respondent's Appendix, pages 1-27; Petitioners' Appendix, pages 3-17), reveals that there was ample support for the decisions of the courts in each instance.

This is not a situation in which the Bourguignons have been made the victims of arbitrary, unsupported decisions by a state court. To the contrary, the Missouri Courts of Appeals found that the Bourguignons' combination with defendant Thirteen-Fifty was so prejudicial against Holiday Inns and so contrary to the purposes of Missouri law that the judgment against Holiday Inns would have to be reversed.

The Bourguignons' suggestion that the Missouri Courts of Appeals engaged in deception to hide the real reason for their decisions against the Bourguignons, namely the Bourguignons' Illinois citizenship, is absurd and constitutes a frivolous waste of this Court's time. The two decisions of the Missouri Court of Appeals contained thorough, well-reasoned discussions of the facts and applicable law upon which the decisions were based. The Bourguignons filed a lawsuit identical to the second state court lawsuit in federal court and the United States District Court and the Eighth Circuit Court of Appeals reviewed the entire record again and came to the same conclusion as the Missouri Court of Appeals.

The "discrimination" visited upon the Bourguignons by the Missouri Courts because of their Illinois citizenship exists only in the imagination of the author of the Bourguignons' Petition and has no basis in fact, in any of the decisions of the lower courts, or in any inference

which can be fairly drawn from the decisions of the lower courts. The Bourguignons' arguments are frivolous.

CONCLUSION

For these reasons, the petitioners' Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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HOLIDAY INNS, INC., Third Party Defendant-Appellant,

v.

THIRTEEN-FIFTY INVESTMENT CO., Third Party Plaintiff-Respondent,

and

John Bourguignon and Cynthia Bourguignon, Plaintiffs-Respondents.

No. WD 36698.

Missouri Court of Appeals, Western District.

May 20, 1986.

Motion for Rehearing and/or Transfer to Supreme Court Denied June 26, 1986.

Application to Transfer Denied Sept. 16, 1986.

Paul H. Niewald, Kansas City, for third party defendant-appellant.

Larry L. McMullen, Kansas City, for third party plaintiff-respondent.

Before LOWENSTEIN, P.J., and TURNAGE and BERREY, JJ.

BERREY, Judge.

This is an appeal by Holiday Inns, Inc., from a judgment rendered on the verdict in favor of Thirteen-Fifty on a contractual indemnity claim. This court reverses.

On the night of June 27, 1977, John Bourguignon, a Staff Sergeant in the United States Air Force, after having

gone to a cocktail party, decided to go swimming in the pool at the Holiday Inn Motel in Warrensburg where he was a guest. He dove off the side of the pool two times without incident. On his third dive he hit his head on the bottom of the pool, on the upslope, and was rendered a permanent quadriplegic. On June 24, 1982, three days before the running of the statute of limitations, John Bourguignon and his wife, Cynthia, filed a petition alleging the owner and operator of the motel, Thirteen-Fifty Investment Company, (hereinafter Thirteen-Fifty) was negligent in the maintenance of the swimming pool. Specifically, it was alleged in paragraph 6 that Thirteen-Fifty "was careless and negligent in the following respect, to wit.

> a. defendant failed to maintain the pool in a safe condition;
>
> b. the water in the pool was unreasonably dirty and murky;
>
> c. the pool area and specifically the water in the pool was poorly lighted;
>
> d. the pool area was not marked with warnings of the dangerous conditions present at the pool;"

Defendant Thirteen-Fifty in its answer and first amended answer denied plaintiffs' allegations and asserted John Bourguignon had been negligent and careless in causing his own injuries.

Thereafter, on July 12, 1983, Thirteen-Fifty filed a third-party petition against Holiday Inns, Inc. and

William W. Bond Jr., and Associates, Inc.,[1] seeking indemnification and/or appointment for any liabilities to be adjudged against it. The basis of its claim arises from a franchise agreement between Holiday Inns of America and Thirteen-Fifty.

The Holiday Inn, including the swimming pool, was constructed in 1968-1969 by Holiday Inns, Inc., Constructions Division, pursuant to a construction contract between Thirteen-Fifty and Holiday Inns, Inc., and Thirteen-Fifty was granted a license to operate as the innkeeper. Holiday Inns, Inc., designated the William W. Bond architectural firm to make the proper plans and specifications.

After the parties had made various procedural motions and engaged in discovery, the court granted the Bourguignons leave to amend their petition which was filed on July 31, 1984. Paragraph 6 of the amended petition is as follows:

> That at the aforesaid time and place the Defendant 13-50 was careless and negligent in the following respects, to wit:
>
> a. That said swimming pool, constructed by Holiday Inns, Inc., Third-Party Defendant herein, was of insufficient depth for diving and as a result the pool was not reasonably safe for diving;

---

[1] Early in the procedural history Thirteen-Fifty on March 22, 1984, filed a dismissal without prejudice as to third-party defendant, William W. Bond and Associates.

b. That the water in the pool at said time and place was unreasonably dirty, turbid, milky and murky;

c. That the pool area, and specifically the water in the pool, was inadequately and negligently lighted and illuminated for diving;

d. The pool area was not marked with warnings of the correct depth conditions present at the pool; and

e. That the pool was deceptively shallow and constructed and maintained as such and was never inspected by Defendant for the purposes of ascertaining the true depth and accuracy of the markings of said pool.

On August 10, 1984, ten days after plaintiff's first amended petition, John and Cynthia Bourguignon, Thirteen-Fifty, and the Thirteen-Fifty's insurer, Employers Mutual Casualty Company (hereinafter Employers Mutual) entered into a settlement agreement "MADE PURSUANT TO SECTION 537.065 OF THE REVISED STATUTES OF MISSOURI." This statute provides that a claimant and a tortfeasor may contract to limit recovery by the claimant to designated assets or an amount covered in the tort-feasor's insurance contract for agreed upon consideration.

Thirteen-Fifty and Employers Mutual stated their intentions in the contract as follows:

> Thirteen-Fifty and Employers Mutual, in recognition of their legal liability to John Bourguignon and Cynthia Bourguignon, wish to pay them ~~a sum which~~ constitutes a small portion of their damages as a result of the injuries they have sustained, in consideration for John

> Bourguignon's and Cynthia Bourguignon's agreement, as allowed by Missouri law, to limit the property subject to execution.

The contract reveals Employers Mutual paid $990,000.00 in consideration "[t]hat in the event of judgment in favor of John and Cynthia Bourguignon . . . for damages for bodily injury . . . or for damages for loss of consortium or services sustained . . . neither John Bourguignon nor Cynthia Bourguignon . . . nor any person, firm or corporation claiming by or through them, will levy execution by garnishment or by any other manner against Employers Mutual or Thirteen-Fifty . . . except upon the following:

> (a) The assets of any other insurer, joint tort-feasor, person, corporation or other entity except Thirteen-Fifty or Employers Mutual.
>
> (b) Account Number 7-7-40-8-1-23 at Citizen's Bank of Warrensburg, and Thirteen-Fifty specifically warrants that this account will contain at all times at least the sum of Ten Thousand and No/100 dollars ($10,000.00), and at least this sum will remain in said account from the date of this Agreement until all sums to which John Bourguignon and Cynthia Bourguignon have obtained the right by judgment against Thirteen-Fifty have been paid, or until the amount contained in the above account has been levied upon by John Bourguignon or Cynthia Bourguignon agree to release Thirteen-Fifty from the obligations created in this subparagraph (2)b, whichever shall occur first.
>
> (c) The assets of any other insurer, joint tort-feasor, or any person, corporation, or other entity which has agreed to indemnify or is

> found to have an obligation to indemnify Thirteen-Fifty or Employers Mutual, or is found to have a legal obligation to contribute in full or in part to any judgment obtained by John Bourguignon and Cynthia Bourguignon against Thirteen-Fifty, or the proceeds which any such insurer, tort-feasor, person, corporation or entity directly or indirectly pays or has paid into the hands of Thirteen-Fifty or Employers Mutual in Reimbursement of any sum paid to John Bourguignon or Cynthia Bourguignon, or both of them."

In essence, the Bourguignons were paid $990,000 by Employers Mutual in exchange for their agreement to a contract which limits their ability to execute against Thirteen-Fifty and Employers Mutual. The Bourguignons, after obtaining a judgment for the damages sustained, may execute only upon a designated bank account containing $10,000 and any amount Thirteen-Fifty collects on its contractual indemnity claim.

The contract also provides that "if a judgment for contractual indemnity is also obtained by Thirteen-Fifty against Holiday Inns, Inc., then all such sums for indemnity greater than the amount of the judgment of plaintiffs against Thirteen-Fifty less the amount paid hereunder shall, regardless of which method is used to accomplish payment, be recovered from Holiday Inns, Inc., by Employers Mutual or Thirteen-Fifty."

After entering into this agreement, Thirteen-Fifty then amended its original third party petition to include the Bourguignons' first amended petition and also pled the existence of the agreement entered into by it and the Bourguignons. Additionally, Thirteen-Fifty reaffirmed its

claim for indemnification from Holiday Inns, Inc., for any liabilities adjudged against it. Thirteen-Fifty specifically set forth, in support of its claim, a provision from the construction contract. It provides:

> 4.18.1 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damages, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Sub-contractor, anyone directly or indirectly employed by any of them or anyone from whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

The suit eventually went to trial; all issues were determined in one action. The Bourguignons proceeded in their cause to prove damages sustained against Thirteen-Fifty as the issue of liability had already been conceded by Thirteen-Fifty and its insurer. Holiday Inns, Inc., was not a party to this action. Thirteen-Fifty abandoned any claims against Holidays Inns, Inc., for apportionment and stood solely on its contractual indemnity claim. The jury was not allowed to hear any evidence concerning the agreement entered into by plaintiffs and Thirteen-Fifty. After all the evidence was heard, the jury returned verdicts in favor of John Bourguignon for

$12,500,000 and Cynthia Bourguignon for $2,000,000 against Thirteen-Fifty. Both verdicts were reduced by 10%, the percentage of fault assessed against John Bourguignon. The jury also returned a verdict in favor of Thirteen-Fifty and against Holiday Inns, Inc., on the contractual indemnity claim in the amount of Thirteen Million Fifty Thousand Dollars ($13,050,000), the amount assessed against Thirteen-Fifty. Holiday Inns, Inc., appeals from this judgment. Thirteen-Fifty does not appeal the verdicts rendered against it for the Bourguignons. Additional facts will be explored as they become relevant only to those issues needed to be addressed for disposition.

In its agreement with the Bourguignons, Thirteen-Fifty admitted liability to plaintiff leaving only the issue of damages for trial. Whatever the outcome on the damage issue at trial, Thirteen-Fifty framed its own protective shield through its agreement with the Bourguignons and its use of the indemnity clause in the construction contract to limit its out of pocket loss. One of the primary issues in this case is whether Holiday Inns, Inc., is required to satisfy Thirteen-Fifty's liability to plaintiff over and above the settlement amount.

Indemnification exists where a party secures or protects another against hurt, or loss or damage. *Eggers v. Centrifugal and Mechanical Industries, Inc.*, 440 S.W.2d 512, 515 (Mo.App.1969). In the context of the indemnity-contribution dichotomy it has been stated "it is . . . appropriate to use the term "indemnity" in referring to a claim for 100% reimbursement. . . . " Generally, under a contract of indemnity, the indemnitor is liable to the indemnitee to the extent of his loss. *Knowles v. Moore*, 622

S.W.2d 803, 806 (Mo.App.1981). The Restatement of Restitution § 80 notes an indemnitor's reimbursement is limited "to the amount of the [indemnitee's] net outlay properly expended." *See Gatto v. Walgreen Drug Co.*, 61 Ill.2d 513, 337 N.E.2d 23, 29 (1975), *cert. denied*, 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976).

This court also recognizes that the language of the indemnity agreement may call for a distinction to be made concerning the indemnitor's responsibility. Contracts may call for indemnity against liability or indemnity against loss. *Moberly v. Leonard*, 339 Mo. 791, 99 S.W.2d 58, 63 (1936). The court in *Moberly* crystalized that distinction:

> 'A promise to indemnify against the existence of a liability is incurred, and the promisee is entitled to recover damages based on the amount of his liability although he has not satisfied it. On the other hand, a promisor who has undertaken merely to indemnify against damage is liable only when actual payment has been made by the promisee, or damage suffered by him; and then only to the extent of such payment or damage.'

Id., 99 S.W.2d at 63 (quoting from 3 Williston on Contracts, 2501, § 1409). This distinction becomes irrelevant, however, in view of the agreement made between the Bourguignons and Thirteen-Fifty to use the indemnity provision in the construction contract to reduce Thirteen-Fifty's own net outlay.

Thirteen-Fifty's agreement with the Bourguignons made pursuant to § 537.065, RSMo 1978 permits the plaintiffs to execute upon "the proceeds which any

. . . tort-feasor . . . pays . . . into the hands of Thirteen-Fifty . . . in reimbursement of any sum paid John Bourguignon or Cynthia Bourguignon, or both of them." According to the respondent, Thirteen-Fifty, through the structuring of the agreement and the favorable verdicts, the indemnification would properly operate as follows. First, as Thirteen-Fifty has paid one million in partial settlement, it will receive that one million under the indemnity agreement from Holiday Inns, Inc. Secondly, plaintiffs, with the unsatisfied judgment of $13,050,000, will execute upon that $1,000,000 paid to Thirteen-Fifty by Holiday Inns, Inc., pursuant to the agreement. Thirteen-Fifty then retrieves another $1,000,000 and the process is repeated until the plaintiffs' $13,050,000 judgment is satisfied. Unfortunately for the Bourguignons, this contrivance breaks down on the last step of the cycle.

As previously mentioned § 537.065, RSMo 1978, allows a tort-feasor and a claimant to contract to limit the recovery to "specific assets listed in the contract and . . . any insurer which insures the legal liability of the tort-feasor for such damage. . . . " In *Farmer's Mutual Automobile Insurance Co. v. Drane*, 383 S.W.2d 714, 718 (Mo.1964) the court stated the obvious purpose of the statute is "to provide a method whereby one insurer might pay, without litigation, the amount agreed upon between it and the claimant." An insurer as a source of recovery does not invariably encompass "the right to indemnification." Contracts of indemnity are not synonymous with contracts of insurance. *Brotherton v. Patterson*, 406 Pa. 400, 178 A.2d 696, 697 (1962). A claimant under the statute looks only to the *insurer of the tort-feasor. Carter v. Aetna Casualty and Surety Co.*, 473 F.2d 1071, 1074

n. 5 (8th Cir.1973). Had the legislature meant to include a contract of indemnification it would have so stated. The legislature is not so careless in its choice of words.

The question becomes whether "the proceeds paid in reimbursement" is an asset within the meaning of the statute. The word "assets" has no primary or technical meaning; its definition is determined by the context in which it is used. 6A, C.J.S. Assets p. 575. In this case, the proceeds do not come into existence until after it has been determined Thirteen-Fifty has a right to those proceeds under the contract provision 4.18.1 for indemnification. The potential proceeds cannot be viewed as assets. Any other construction would leave indemnitors defenseless against parties who may similarly settle in the primary action. Furthermore, it would provide incentive for the indemnitee to breach its duty of acting "reasonably under all circumstances so as to protect the indemnitor against liability," *American Export Isbrandtsen Lines, Inc. v. United States*, 390 F.Supp. 63, 68 (S.D.N.Y.1975) and of refraining from compromising any of its rights, particularly in settlement negotiations. *Central National Insurance Co. of Omaha v. Devonshire Co.*, 426 F.Supp. 7, 20 (D.Neb.1976) *rev'd in part on other grounds*, 565 F.2d 490 (8th Cir.1977); *see Gatto v. Walgreen Drug Co., supra*. In the instant case, the abrogation of Thirteen-Fifty's duties toward Holiday Inns, Inc., is seen not only in the agreement's structure but also in the manner in which it sought to accomplish its purpose, i.e., a method to pass-through the damage amount from Holiday Inns to the Bourguignons.

Thirteen-Fifty and its insurer specifically admitted liability in the agreement with the Bourguignons by making references to Holiday Inns, Inc., as the one "who

negligently created or caused to be created the dangerous pool"; and who "refuses to acknowledge [its] responsibility." Thirteen-Fifty additionally admitted on the record, although out of the presence of the jury, that its "interests in this case [were] more aligned with the plaintiff[s] than those of the third party defendant." Further, in closing argument before the jury, the attorney for Thirteen-Fifty stated, "under the law of Missouri, because we had a dangerous condition on our premises, namely a swimming pool that was not safe to dive in because of that, because we should have known of it or knew of it, that's true, we are liable under the law to John – Missouri law to John Bourguignon. We can come into court and deny it and try to get out it somehow, or we can come into court and say that's the way it is."

The breach of Thirteen-Fifty's duty toward its indemnitor, Holiday Inns, Inc., is also shored up by the fact Thirteen-Fifty made no attempt to cross-examine plaintiff's expert witness, an economist, who testified to the amount of plaintiff's future damages. Similarly, with regards to evidence concerning alcohol consumption by John Bourguignon which would have the potential effect of reducing the monetory award assessed against Thirteen-Fifty, Thirteen-Fifty's attorney made the following comments in closing argument:

> I want to tell you that the issue of intoxication was placed in this case by me, my client. I filed the pleading in this court house some years ago now, that said and alleged that there was evidence that John Bourguignon was intoxicated. There was evidence of that, and you heard it.

> You heard Mike Cook, the Thunderbird from Nellis Air Force Base, say that John told him, "I had five to seven drinks. I'm feeling no pain." And Sgt. Cook said he looked as if he was intoxicated. All right. That's why we put that issue in this case, because it belongs here. And you should consider that, and you should determine what importance to give to it, and what percentage of fault that deserves.
>
> But, I must say to you it's curious, and for me, somewhat hard to understand, that the ranking enlisted man, Chief Master Sergeant Dan Newton, who more or less seemed to be in charge of the enlisted men at the party, says pretty much the opposite; that John did not, John had a couple of drinks, as John has admitted. Dan Newton says he was not intoxicated. And you know, there were probably 12 or 16 other airmen out there who may have had an occasion to see John. I think you can probably believe that if any of those airmen saw something in John that looked as if he was intoxicated, Holiday Inn probably would have brought them here.

Thus, the facts in this case warrant the application of the "general rule of law that any act[s] on the part of any indemnitee which materially increases the risk, or prejudices the rights, of the indemnitor, will discharge the indemnitor under the contract of indemnity." *Hiern v. St. Paul-Mercury Indemnity Co.*, 262 F.2d 526, 529 (5th Cir.1959); *see, e.g., American Casualty Co. of Reading, Penn. v. Idaho National Bank*, 328 F.2d 138, 142-3 (9th Cir.1964); *General Insurance Co. of America v. Fleeger*, 389 F.2d 159, 161 (5th Cir.1968); *see also Rochelle Bail Agency, Inc. v. Maryland National Insurance Co.*, 484 F.2d 877, 879 (7th

Cir.1973) (Extinguishment of indemnitor's obligation because bondsman failed to maintain supervision over accused and thus breached its duty towards its indemnitor).

Thirteen-Fifty asserts that admitting liability in an agreement made pursuant to § 537.065, RSMo 1978, or admitting liability in court[2] is not objectionable conduct as seen in *United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America*, 522 S.W.2d 809, 819 (Mo. banc 1975). In *United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America, supra*, at 818-19 the defendant repeatedly requested its insurer to assume his defense and the insurer refused which caused it to be bound by the results of the litigation. That case is distinguishable from the case at bar in that Thirteen-Fifty did not request Holiday Inns, Inc., to assume its defense nor did the indemnity provision 4.18.1 of the construction contract require it.

In a similar light, Thirteen-Fifty chides Holiday Inns, Inc., for its dissatisfaction with the Bourguignon verdict because it failed to exercise its right to intervene citing *Alsbach v. Bader*, 616 S.W.2d 147 (Mo. App.1981). The record reveals, however, that Holiday Inns, Inc., cross-examined most, if not all, of the witnesses presented by plaintiff.

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[2] In *United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America, supra*, at 819 the defendant also failed to offer evidence in defense of the claim.

In sum, the settlement agreement as structured is not consistent with the purpose of § 537.065.[3] It motivates an indemnitee to compromise the rights of the indemnitor and to align its interests with those of the claimant in a manner which causes the indemnitee to avoid its responsibilities. And here, the failure by Thirteen-Fifty as an indemnitee to carry out those responsibilities toward its indemnitor Holiday Inns, Inc., rose to the level requiring Holiday Inns to be discharged under the indemnity contract.

All other motions are herein denied.

The judgment in favor of Thirteen-Fifty on its indemnity claim is reversed.

All concur.

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[3] The obvious purpose behind this agreement was to rectify plaintiff's failure to file suit against Holiday Inns before the running of the statute of limitations. It attempts to force Holiday Inns Inc., to make a status change from third-party defendant into "defendant."

John BOURGUIGNON and Cynthia Bourguignon, Appellants,

v.

THIRTEEN-FIFTY INVESTMENT CO. and Holiday Inns, Inc., Respondents.

No. WD 40145.

Missouri Court of Appeals, Western District.

Aug. 30, 1988.

Motion for Rehearing and/or Transfer to Supreme Court Denied Oct. 4, 1988.

Application to Transfer Denied Nov. 15, 1988.

John C. Milholland, Harrisonville, Max W. Foust, Kansas City, for appellants.

Kevin E. Glynn, Larry L. McMullen, Kansas City, for respondents.

Before COVINGTON, P.J., and NUGENT and GAITAN, JJ.

GAITAN, Judge.

This is the second action filed by plaintiffs, John and Cynthia Bourguignon, involving John Bourguignon's accident at a swimming pool in Warrensburg, Missouri on June 27, 1977. This Court decided the first action in *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App.1986), and reversed Thirteen-Fifty's judgment in indemnity. This second action arises out of the same events, parties and issues as the first. However,

in this second action the Bourguignons seek to execute against Holiday Inns on an equitable creditor's bill theory and employ a legal theory of noncontractual indemnity which was intentionally abandoned in the first action by Thirteen-Fifty. The trial court dismissed the Bourguignon's Second Amended Petition and Thirteen-Fifty's First Amended Crossclaim in the second action. We affirm.

STATEMENT OF FACTS

A. *First Action*

Both actions arose out of an accident in which John Bourguignon sustained injuries on June 27, 1977, at a swimming pool in Warrensburg, Missouri. On June 24, 1982, three days before the expiration of the statute of limitations, § 516.120(1), RSMo 1952, John and Cynthia Bourguignon filed a petition in the first action only against Thirteen-Fifty. They alleged negligence in the operation and maintenance of the swimming pool.

Thirteen-Fifty initially filed an Answer and First Amended Answer denying the Bourguignons' allegations and asserting contributory negligence against John Bourguignon. Additionally, Thirteen-Fifty filed a Third Party Petition against Holiday Inns on July 12, 1983, seeking noncontractual indemnity and/or apportionment of fault under several theories.

The trial court granted the Bourguignons leave to file their First Amended Petition against Thirteen-Fifty on July 31, 1984, over the objections of Holiday Inns. Paragraph 6 of the First Amended Petition added allegations

of negligence against Thirteen-Fifty for the construction activities of Holiday Inns. They alleged that the agreement was to limit recovery as to Thirteen-Fifty in Accordance with § 537.065, RSMo 1978. On August 10, 1984, ten days after the Bourguignons filed their First Amended Petition, the Bourguignons, Thirteen-Fifty and Thirteen-Fifty's insurer, Employers Mutual Casualty Company, executed a settlement agreement.

Under this agreement, the Bourguignons were paid $990,000 by Employers Mutual in exchange for their agreement to limit execution against Thirteen-Fifty and Employers Mutual. In the agreement, Thirteen-Fifty admitted liability for the construction activities of Holiday Inns only. The agreement also provided that if a judgment for contractual indemnity was obtained by Thirteen-Fifty against Holiday Inns, then all sums for indemnity over the amount of the judgment of the Bourguignons against Thirteen-Fifty would be passed to the Bourguignons, less the amount paid to the Bourguignons under the agreement.

Seven days after entering into this agreement, Thirteen-Fifty amended its Third Party Petition to incorporate the Bourguignons' First Amended Petition, including the allegations of negligence in construction by Holiday Inns. Thirteen-Fifty also amended to specifically designate a contractual provision in support of its indemnity claim against Holiday Inns.

At the trial, Thirteen-Fifty voluntarily abandoned its noncontractual indemnity claims and all other claims against Holiday Inns, except for its contractual indemnity claim. The Bourguignons attempted to prove damages

against Thirteen-Fifty for the construction activities of Holiday Inns, as liability had been conceded by Thirteen-Fifty for the construction activities of Holiday Inns in the agreement. Over the objections of Holiday Inns, the jury was not allowed to hear any evidence concerning the agreement entered into between the Bourguignons and Thirteen-Fifty. Nor was any evidence of contributory negligence by John Bourguignon presented.

This court held that Thirteen-Fifty breached its duties to its indemnitor, Holiday Inns, by actively helping the Bourguignons prove liability against Holiday Inns while Thirteen-Fifty represented to the jury that it was contesting the case. Further, at the trial of the first action, Thirteen-Fifty's counsel made no attempt to cross-examine plaintiffs' expert economist, and in the closing argument, Thirteen-fifty's counsel admitted liability for having a dangerous swimming pool on its premises and argued against John Bourguignon's contributory negligence. Other examples of the combined efforts of the Bourguignons and Thirteen-Fifty at the trial of the first action against Holiday Inns were cited by this Court. These efforts resulted in an adverse ruling on Thirteen-Fifty's third party action.

This Court held that due to the prejudicial conduct of Thirteen-Fifty, combined with the Bourguignons, Holiday Inns would be discharged from any obligations in indemnity. As a consequence, we reversed the jury verdict against Holiday Inns without remanding for trial. The Supreme Court denied the Bourguignons' Petition for a Writ of Prohibition and also denied the applications for transfer filed by the Bourguignons and Thirteen-Fifty. That judgment thereafter became final.

B. *Second Action [WD No. 40145 (Consolidated with WD No. 40170)]*

The Bourguignons filed a second action on August 27, 1985, while the first action was on appeal, in an attempt to execute on Thirteen-Fifty's judgment in contractual indemnity against Holiday Inns on an equitable creditor's bill theory. However, neither Thirteen-Fifty nor the Bourguignons had a judgment against Holiday Inns. Holiday Inns filed a Motion to Dismiss the Bourguignons' Petition in the second action on September 17, 1985. A hearing was held on Holiday Inns' Motion to Dismiss on September 23, 1985. However, the court made no ruling on the merits, because it found that the service of process on Holiday Inns was not properly certified. In its answers in the second action, Thirteen-Fifty admitted all of the allegations of the Bourguignons' First and Second Amended Petitions.

Thirteen-Fifty filed a Crossclaim and first Amended Crossclaim against Holiday Inns in the second action. Thirteen-Fifty alleged noncontractual indemnity against Holiday Inns; a theory which was pled by the Bourguignons in their First and Second Amended Petitions in the second action. Thirteen-Fifty had alleged noncontractual indemnity against Holiday Inns in its Third Party Petition in the first action before abandoning that allegation at the trial of the first action.

Holiday Inns filed motions to dismiss the Bourguignons' First and Second Amended Petitions and Thirteen Fifty's Crossclaim and First Amended Crossclaim in the second action. Holiday Inns alleged, *inter alia*, that the

matters raised by the Bourguignons and Thirteen-Fifty in this second action were barred by the doctrines of res judicata and collateral estoppel, and that no judgment against Holiday Inns existed to execute against.

The trial court heard oral arguments on Holiday Inns' motions to dismiss on October 29, 1987. No other motions were taken up on that date. Again, Thirteen-Fifty aligned itself with the Bourguignons against Holiday Inns.

In its Order of November 20, 1987, the trial court granted Holiday Inns' motions to dismiss the Bourguignons' Second Amended Petition and Thirteen-Fifty's First Amended Crossclaim in the second action. The court held:

> The Court finds and holds that whether Holiday Inns' motions are characterized as motions to dismiss or, as plaintiffs urge, motions for summary judgment, plaintiffs' amended petition and Thirteen-Fifty's amended crossclaim are dismissed on the basis that by the ruling of the Missouri Court of Appeals in *Holiday Inns, [Inc.] vs. Thirteen-Fifty Investment Company and John Bourguignon and Cynthia Bourguignon*, 714 S.W.2d 597 (Mo.App.1986), they are now estopped from asserting further rights to collect plaintiffs' judgment against Holiday Inns and that there is no judgment upon which execution can issue in favor of plaintiffs against Holiday Inns.

Both the Bourguignons and Thirteen-Fifty appeal that judgment.

While at first glance this case seems to be fairly complex, it may be resolved on a relatively simple basis. The Bourguignons' Second Amended Petition in the second action sought an equitable creditor's bill which requires the existence of a judgment. In *General Grocer Co. v. Ahlemeier*, 627 S.W.2d 61 (Mo.App.1981), the court held that "[w]hen a creditor seeks to maintain a creditor's bill, he is required to first reduce his claim to a judgment before he seeks relief in equity." *Id.* at 64. Since this Court reversed Thirteen-Fifty's judgment in contractual indemnity in the first action, there was no judgment against Holiday Inns.

It is clear from the argument of the Bourguignons that they are attempting to step into the shoes of Thirteen-Fifty. This, they believe they are entitled to do because of the judgment which followed their settlement agreement. They perceive that beyond the $990,000 to which Thirteen-Fifty and the Bourguignons agreed, the Bourguignons have a right to any chose in action as an asset of Thirteen-Fifty. The chose in action that they believe they are entitled to is the claim against Holiday Inns that Thirteen-Fifty would be entitled to pursue for noncontractual indemnity.

The doctrines of res judicata and collateral estoppel require dismissal when a party tries to relitigate an action involving the same events, parties, and issues as in a previously decided action. This is true notwithstanding the party's attempt to pin a different label on its legal theories in the second lawsuit. *Siesta Manor, Inc. v. Community Federal Savings & Loan Ass'n.*, 716 S.W.2d 835 (Mo.App.1986); *Dreckshage v. Community Federal Savings & Loan Ass'n.*, 641 S.W.2d 831 (Mo.App.1982).

Both actions by the Bourguignons involve the accident of John Bourguignon in the swimming pool in Warrensburg on June 27, 1977, and the potential responsibility of John Bourguignon, Thirteen-Fifty and Holiday Inns for his injuries and his wife's derivative claims. The Bourguignons and Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action. As a matter of fact, as previously stated, Thirteen-Fifty initially alleged noncontractual indemnity and tort claims against Holiday Inns in the first action, but they intentionally and strategically abandoned all claims except contractual indemnity in that first action. All of the facts relied upon by the Bourguignons and Thirteen-Fifty in support of their present tort, fraud, and noncontractual indemnity claims were known during discovery and before the trial of the first action.

Thirteen-Fifty and the Bourguignons now erroneously argue that Thirteen-Fifty misconceived its contractual indemnity remedy in the first action, and, therefore, brought an "imaginary" or "mistaken" remedy by pursuing the contractual indemnity. They take this position because of the finding of this Court in disposing of the first action. They apparently conclude that we held that Thirteen-Fifty never had a remedy of contractual indemnity. However, this Court held in *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App.1986):

> Thus, the facts in this case warrant the application of the "general rule of law that any act[s] on the part of any indemnitee which materially increases the risk, or prejudices the rights, of the

> indemnitor, will discharge the indemnitor under the contract of indemnity."

Id. at 603. This Court went on to state that the failure of Thirteen-Fifty as an indemnitee to carry out those responsibilities toward its indemnitor, Holiday Inns, rose to the level of requiring Holiday Inns to be discharged under the indemnitor contract.

Contrary to the position of both the Bourguignons and Thirteen-Fifty, we construe this to mean that Thirteen-Fifty did, in fact, initially have the remedy of contractual indemnity to pursue against Holiday Inns, but forfeited that right by its conduct. That conduct was not limited to the execution of the settlement agreement, *see Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d at 602-03, but also included conduct in direct examination and cross-examination of its witnesses, and Thirteen-Fifty's confession of liability for Holiday Inns. The structure of the settlement was merely a method to pass damages to Holiday Inn; an attempt to create an asset to justify the use of § 537.065, RSMo 1978. As we previously stated in *Holiday Inns v. Thirteen-Fifty, supra*, at 603, "the settlement agreement as structured is not consistent with the purpose of § 537.065."

In defense of its position, the Bourguignons have argued that *Pemberton v. Ladue Realty and Construction Co.*, 359 Mo. 907, 224 S.W.2d 383 (1949), applies. In *Pemberton*, the plaintiff alleged that he had not been paid for services rendered to a partnership, submitted his action for damages on a quantum meruit theory and obtained a verdict and judgment in his favor. The Court of Appeals held

that, as a matter of law, the plaintiff improperly submitted the case on the quantum meruit theory, which was not a viable remedy because he had a proper cause of action for a breach of a formal partnership agreement. The Supreme Court reversed by drawing a distinction between the situation in which a party proceeds on a "mistaken" or "imaginary" remedy out of ignorance about his proper remedy, and the situation in which a party knowingly elects one of two viable remedies. That court held that there can be no election of remedies unless two or more inconsistent remedies exist, as opposed to the pursuit of an imaginary or mistaken remedy. This principle was also stated by the Court in *Hollipeter v. Stuyvesant Insurance Co.*, 523 S.W.2d 595, 598 (Mo.App.1975).

The Supreme Court in *Davis v. Hauschild*, 243 S.W.2d 956, 959-60 (Mo.1951), held that if a party pursues one of two consistent remedies and obtains a satisfaction of his claim, he is barred from pursuing the other remedy. Missouri law is well settled that a party may not pursue another remedy in this situation regardless of whether the judgment has been for or against the electing party. *King v. Guy*, 297 S.W.2d 617, 622 (Mo.App.1957); *Stambaugh v. Wedlan*, 371 S.W.2d 361, 363 (Mo.App.1963).

Thirteen-Fifty is attempting to follow the forbidden course condemned by the courts in *Hollipeter*, *Pemberton*, and *Davis*. Thirteen-Fifty initially alleged noncontractual indemnity and several other remedies in the first action, but voluntarily abandoned all but contractual indemnity as part of its strategic efforts to aid the Bourguignons in the first action pursuant to the agreement. Having pursued contractual indemnity to judgment in the first

action, Thirteen-Fifty cannot bring a second action under another theory. This case does not invoke the imaginary or mistaken remedy exception to the election of remedies doctrine.

The Bourguignons and Thirteen-Fifty attempt to argue that because of the decision of this Court in the first action, Thirteen-Fifty pursued an imaginary or mistaken remedy. That is not the case here. This Court did not state that it was reversing Thirteen-Fifty's verdict against Holiday Inns due to any feeling by the Court that Thirteen-Fifty's claim was imaginary or mistaken. Instead, this Court held that the conduct of Thirteen-Fifty in the first action under its agreement with the Bourguignons and at trial was so prejudicial and contrary to the purpose of the Missouri law that Holiday Inns was thereby discharged from its duty to indemnify under the contract. In none of the cases cited by the Bourguignons or Thirteen-Fifty did the parties have an absolute preexisting right to their allegedly mistaken theory. These parties did have the right; however, that right was forfeited by their prejudicial conduct.

The Bourguignons argue that contractual indemnity and noncontractual indemnity are not inconsistent, thus negating the bar of the election of remedies doctrine. We disagree with this position. We find that the relationship of the parties, due to the prejudicial settlement agreement, led Thirteen-Fifty to voluntarily elect contractual indemnity as its sole remedy and to abandon noncontractual indemnity. We can only guess at what their reasons could have been.

Here, we find that because the claims of noncontractual indemnity and contractual indemnity were used as strategic devices by Thirteen-Fifty in the first action, Thirteen-Fifty's election of one remedy and abandonment of the other should be binding on Thirteen-Fifty. As Thirteen-Fifty has taken one remedy to judgment and lost, they should not be allowed to follow that action with an alternative theory of recovery. Once again, it should be stated that Thirteen-Fifty did have the remedy of contractual indemnity, but through its course of prejudicial conduct, it forfeited that remedy.

The judgment of the trial court is affirmed.

All concur.

IN THE CIRCUIT COURT OF BUCHANAN COUNTY
STATE OF MISSOURI
DIVISION NO. 2

VICTOR A. ARANA, M.D. Plaintiff vs. WENDELL E. KOERNER, JR. ROBERT E. DOUGLAS, ROBERT A. BROWN, JR. and JOHN P. BEIHL Defendants	Case No. CV 383-1222CC JURY TRIAL DEMANDED ON ALL CLAIMS

PETITION FOR ACTUAL AND PUNITIVE DAMAGES

FILED NOV 15 1983

Comes now plaintiff, Victor A. Arana, M.D., through his counsel, Charles L. Wiest, Jr., and for his causes of action against defendants Wendell E. Koerner, Jr., Robert E. Douglas, Robert A. Brown, Jr. and John P. Beihl states as follows:

Count I

BREACH OF CONTRACT

1. Plaintiff, Victor A. Arana, M.D., is a medical doctor and surgeon, duly licensed to practice medicine in the State of Missouri. Plaintiff is and at all times relevant herein was a resident of St. Joseph, Buchanan County, Missouri, and practicing medicine and surgery in and around St. Joseph, Missouri.

2. Defendants Wendell E. Koerner, Jr., Robert E. Douglas, Robert A. Brown, Jr. and John P. Beihl are and at all times relevant herein were attorneys at law, licensed under the laws of Missouri. Upon information and belief, plaintiff states that defendants above named were and are practicing law under the partnership firm name of Brown, Douglas & Brown with their office and principal place of business at Pioneer Building, Suite 202-209, St. Joseph, Missouri.

3. The acts and omissions of defendant, Wendell E. Koerner, Jr. as hereafter described were done and performed on behalf of and within the scope of his authority as a partner of defendants Douglas, Brown & Beihl in the partnership of Brown, Douglas & Brown.

4. The Medical Protective Company of Fort Wayne, Indiana, (hereafter "Medical Protective") is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Fort Wayne, Indiana and is authorized to do business, including the sale of medical malpractice insurance in the State of Missouri.

5. On June 1, 1980, for valuable consideration, Medical Protective issued to plaintiff as the insured a policy of insurance, policy number 518270. A copy of said policy is attached hereto as "Exhibit 1" and incorporated by reference as if fully set out herein.

6. Policy number 518270 as described above provided coverage for the period June 1, 1980 through June 1, 1981.

7. Pursuant to the terms of policy number 518270, Medical Protective agreed *inter alia* to defend plaintiff against claims for medical malpractice and to pay on plaintiff's behalf all sums of money for which plaintiff became obligated by reason of liability imposed upon him. With respect to defending plaintiff against claims, policy number 518270 stated:

> "B. Upon receipt of notice, the Company shall immediately assume its responsibility for the defense of any such claim and shall retain legal counsel, who shall defend in conjunction with the legal department of the Company. Such defense shall be maintained until final judgment in favor of the Insured shall have been obtained or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted at the Company's cost and without limit as to the amount expended."

8. Policy number 518270 further provided at paragraph D.

> "D. The Company shall not compromise any claim hereunder without the consent of the Insured."

9. On or about August 10, 1981, an action was commenced against plaintiff herein in the Circuit Court for Buchanan County, Missouri, Case Number CV381-882, by Mary Elam, William J. Elam, Jr., Cheryl Vavra and Robert W. Elam, alleging that plaintiff's treatment of William Elam was negligent.

10 Plaintiff duly advised Medical Protective of the initiation of this action and otherwise complied with all

conditions, precedent on his part under policy number 518270.

11. Sometime between August 10, 1981, and August 16, 1981, Medical Protective retained defendants, to defend plaintiff against the action above described. On August 28, 1981, plaintiff was advised by defendant R. A. Brown, Jr. that defendant Koerner would be the attorney responsible for representling [sic] plaintiff's interests.

12. Pursuant to the terms of policy number 518270 and the representations of R. A. Brown, Jr., plaintiff and defendants entered to into an attorney-client relationship whereby defendants undertook to defend plaintiff in a proper, skillfull and diligent manner. In particular, defendants were obligated not to settle the claim against plaintiff without first obtaining his consent.

13. On or about August 27, 1981, plaintiff told defendant, R. A. Brown, Jr. by letter that he (plaintiff) wanted the case to go to the end because there were no grounds to support it.

14. On or about February 18, 1983, defendant Koerner, without first advising plaintiff or obtaining his consent, entered into a settlement agreement with the plaintiffs in Case No. CV381-882 which obligated Medical Protective to pay to said plaintiffs on the instant plaintiff's behalf the sum of $97,500.00.

15. On April 7, 1983, plaintiff was advised by Medical Protective that policy number 518270 would not be renewed and that another policy insuring plaintiff's corporation would be cancelled.

16. The fact that the *Elam* action above described was settled, has become known in the medical community in St. Joseph, Missouri and surrounding areas.

17. As a direct, natural, proximate and foreseeable result of defendants' unauthorized settlement of the *Elam* case and as contemplated by Medical Protective, defendants and plaintiff, plaintiff has suffered damages including but not limited to:

(a) Inability to obtain medical malpractice insurance of sufficient breadth and amount to cover plaintiff's medical and surgical practice;

(b) Loss of hospital and surgical privileges;

(c) Loss of patient referrals from and consultation with other physicians;

(d) Loss of patients seeking plaintiff's advice and treatment;

(e) The need to defend himself against specious malpractice claims;

(f) Severe emotional distress including anxiety, loss of sleep, nausea, embarrassment and fear of performing surgery.

18. Defendants' settlement of the *Elam* case was done at the insistence of and in furtherance of their business relationship with Medical Protective and was directly contrary to the wishes of and best interests of plaintiff. Defendants knew that their duties as attorneys in the *Elam* case were to plaintiff and not Medical Protective and their acts and omissions were in knowing disregard of that duty.

19. Defendants failed to notify plaintiff of the contemplated settlement of the *Elam* case prior to its settlement because they know that plaintiff would object thereto.

20. Defendants' actions in failing to notify plaintiff of the contemplated settlement of the *Elam* case, in settling the case without plaintiff's consent and in failing to advise plaintiff of the settlement after it was perfected were malicious, wanton and done with reckless disregard to plaintiff's rights.

21. Plaintiff at present is unable to ascertain the exact amount of his damages, but believes them to be in excess of $4,000,000.00.

WHEREFORE, plaintiff prays for an award against all defendants jointly and severally of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $10,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

COUNT II

NEGLIGENCE

22. Plaintiff realleges and incorporates herein by reference paragraphs 1-21, *supra*.

23. As plaintiff's attorney defendants owed to plaintiff the duty to use such skill, prudence and diligence, as members of the legal profession generally possess and to loyally represent plaintiff.

24. Defendants breached their duty owed to plaintiff by reason of the attorney-client relationship existing between them by:

(a) Settling the *Elam* case without plaintiff's authorization or consent;

(b) Placing the interests of Medical Protective above those of plaintiff;

(c) Failing to adequately investigate and evaluate the facts in the *Elam* case;

(d) Failing to advise plaintiff of the conflicts in their representation of him and their employment by Medical Protective.

WHEREFORE, plaintiff prays for an award against all defendants jointly and severally of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Costs of this action;

(d) Such other relief as may be appropriate.

COUNT III

WILFUL TORT

25. Plaintiff realleges and incorporates by herein reference paragraphs 1-24, *supra*.

26. Defendants knew that the acts and omissions as set forth in paragraph 24(a) through 24(d) were contrary to their duty to plaintiff and were done willfully, wantonly, maliciously and in reckless disregard of their obligations to plaintiff.

WHEREFORE, plaintiff prays for an award against all defendants jointly and severally of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $1,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

Respectfully submitted,

VICKER, MOORE & WIEST
By /s/ Charles L. Wiest, Jr.,
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